The current status of coparcenaries in English Law

As yet the UK courts have not, to my knowledge given explicit consideration to the precise legal status that should be given to a corporately structured South Asian coparcenary operating and domiciled within a UK jurisdiction. Nevertheless in (*Khan v Khan* [2007] EWCA Civ 399) the Court of Appeal recently found itself addressing a case in which the issues of precisely this kind were at stake, and indeed elicited a comment from Arden LJ to the effect that this was

> one of the first cases in which the court has had to consider a submission about the admissibility, on a question as to the interpretation of a contract, of evidence as to the cultural tradition of the parties to a contract.

With this in mind the learned judge took the opportunity to pronounce a dictum with respect to which I she argued the court must pay regard in circumstances of this kind:

> 36. As I have said, when interpreting an agreement, whether written or oral, the court must look at the matrix of fact as described by Lord Hoffmann. This matrix of fact would no doubt include evidence as to the conduct that the parties regularly adopted. Where the parties are members of a particular community, then in my judgment the court must bear in mind that they may observe different traditions and practices from those of the majority of the population. That must be expected and respected in the jurisdiction that has received the European Convention on Human Rights. One of the fundamental values of the Convention is that of pluralism: see Kokkinakis v Greece [1994] 17 EHRR 397. Pluralism is inherent in the values in the Convention. Pluralism involves the recognition that different groups in society may have different traditions, practices and attitudes and from that value tolerance must inevitably flow. Tolerance involves respect for the different traditions, practices and attitudes of different groups. In turn, the court must pay appropriate regard to these differences.

As an anthropologist with a long-standing academic track-record of exploring the ways in which English law might best respond to the ways in which further dimensions of ethnic plurality have been introduced into the British social order as a result of the rapid growth of South Asian ethnic colonies in the UK, I have no quarrel whatsoever with this formulation: indeed like many other commentators in the field I positively applaud the thrust of her argument, and thus far at least have said so in print.

A critical perspective

Nevertheless on close examination of the way in which the court chose to determine Khan v Khan, I have reached the opinion that despite the admirable character of Lady Arden's *dicta*, there are good reasons to suppose that she, no less than her fellow judges on the bench, *failed*

to pay appropriate regard to the relevant underlying cultural differences, if only because the case was not presented to the court in such a way that the bench might adequately appreciate the full extent of the culturally-conditioned features of the case which should in my opinion have been included in the matrix of fact under consideration.

This paper sets out to show precisely how this paradoxical outcome has been precipitated. Having carefully studied the entire judgement, I rapidly came to the conclusion that the key reason for this was their failure to address what has now become a commonplace issue: namely the extent to which English law is (or should be) prepared to recognise the existence of – and the consequences of the existence of – corporately structured South Asian families which have now domiciled themselves in the UK. In this respect to issues regularly come to the fore. They include

i. Should such corporate coparcenaries be regarded as a having a distinct legal personality (as they had in Anglo-Hindu law, and as those involved still implicitly so assume), or are these unincorporated pseudo-corporations merely a vehicle for fraudulent conspiracies?

ii. If and when such coparcenary fractures, should partition occur on a negotiated basis precipitated by a consensus reached as between all members of the corporation? Or should assets be distributed on the assumption that those persons owe no fiduciary obligation to the (fictional) whole, and that current possession is consequently nine points of the law?

iii. In turn, should the decision of a 'family meeting' – the most usual means of dispute resolution in such familial contexts – be respected by the courts? Or can those who feel aggrieved by such a consensus entitled to ignore the settlement arrived at, on the ground fiduciary assumptions around which the family meeting reached its consensus has no force in English law?

I have encountered cases in which issues i. and ii. were at the forefront, but in *Khan v Khan* the key implicit issues were ii. and iii.. But wherever the issues may lie, cases arising in such context manifestly fall within the scope of Lady Arden's *dictum*.

However taking a position in principle is one thing: putting it into practice is quite another. Hence from my position as an expert anthropologist, a rather different issue arises. If and when a dispute arises between members of a community whose members observe different traditions and practices from those of the majority of the population, and where efforts are made to resolve the dispute internally, or in other words within the context of those traditions and practices – a entirely commonplace development amongst virtually all section of

Britian's South Asian population, how can the outcome of such activities best be represented in external/majoritarian contexts, and most especially in courts of law?

Two options are available. Either an effort can be made to introduce a presumptively ill-informed audience to the alternative set of conceptual and organisational premises within which members of the minority community routinely order their affairs, as a prelude to the presentation of the origins and outcome of the dispute; or these details can be 'translated', in the sense of being articulated in terms more familiar to a majority audience, and from which the underlying cultural dynamics have effectively been 'bleached out'. Given that members of dominant majorities rarely display much interest in the exotic premises deployed by marginalised minorities, South Asian settlers in contemporary Britain invariably deploy the latter strategy.

When the objective is merely to convey information at the level of a good approximation, such economies with the truth have few harmful effects. But if circumstances change, such that institutional agencies seek to explore exactly what has been going on as between the persons concerned, the use of such bleaching strategies can have disastrous consequences; unless those engaged in making that exploration have acquired the cultural competence (and/or access to the relevant expertise) to enable them to look behind such careful 'as if' representations, they will find it hard, if not impossible, to respond fully to the promise of Lady Arden's admirable dictum. Indeed I would argue that this was a trap into which she herself fell in her analysis of the issues in *Khan v Khan*.

***Khan v Khan*: the Facts**

Afzal and Ashraf Khan came from Pakistan to this country in 1968, when in their teens, and from about 1978 they have been involved in various joint and separate business ventures. Khan and Co was engaged in property letting and management, but the trial judge described the documentary evidence as to its origins as "surprisingly sparse". The brothers at some time formed another partnership, which they called Chic Boutique, a retail clothing business. Afzal appears to have taken the main responsibility for the running of Khan and Co and Ashraf of Chic Boutique.

Apart from the notional division of the taxable profits shown in the tax returns was no accounting as between the two brothers in relation to the profits of either of the Chic Boutique business or of the Khan and Co property management business. In general the

finances of both businesses appear to have been controlled by Afzal who in practice seems to have allowed Ashraf to pay himself out of the modest earnings of Chic Boutique and to have undertaken through Khan and Co the payment of the mortgage, council tax and insurance in connection with Ashraf's residence.

From 1999 onwards the relationship between the two brothers became steadily more fractious. Ashraf began to ask questions, in particular as to who owned particular properties and why the ownership of some properties which he had thought were owned by the nominees of the partnership had apparently been transferred into Afzal's sole name. He began to distrust the answers which he was given by Afzal and the differences between their respective lifestyles which at one time had simply seemed to reflect their different roles in the businesses began to rankle. In crude terms Ashraf believed that profits generated by the partnership business were being diverted by Afzal into his own pocket.

For his part Afzal plainly regarded Ashraf's unaccustomed inquisitiveness and acquisitiveness as both extremely irritating and impertinent. By the time the two brothers fell out Afzal had persuaded himself that Ashraf had never pulled his weight in the property management business. Indeed Afzal began to take the view that they had never really been partners at all, and that he had only admitted Ashraf to the business in the sense that he had been allowed to call himself a partner; his entitlement to share in the profits of the business was simply an entitlement to be paid such share if any of the profits as Afzal chose to pay him and he had no interest in the capital of the partnership.

The relationship of comprehensive mutual trust which had hitherto underpinned their relationship had been replaced with an equally comprehensive condition of mistrust. A parting of the ways was in prospect, and precipitated ever more heated squabbles over just who owned what. Other members of their sibling group (two sisters and a brother) were alarmed by these developments, and called a family meeting, which took place 3rd August 2002. The purpose of the meeting was to facilitate a resolution of the dispute between their brothers.

By this stage it was quite clear that the prospect of negotiating a restoration of the *status quo ante* of comprehensive mutual collaboration was unavailable. Hence the dispute could best be resolved by negotiating a partition of their mutually acquired assets on a basis which all

concerned could accept as equitable. Such a scheme of partition was indeed agreed upon. Its terms were as follows:

i. Ashraf would have no further interest in the business of Khan and Co and that Afzal could continue to trade under that name.
ii. Afzal would have no further interest in Chic Boutique and that Ashraf could continue to run it.
iii. Ashraf would have the entire legal and beneficial interest subject to mortgages in three properties then registered in their joint names.
iv. Afzal would have the entire legal and beneficial interests in certain other properties then registered in their joint names.
v. Ashraf acknowledged that he had no claim on another property that he had mistakenly believed was then registered in their joint names.

Having reached this agreement, the family then took steps to formalise this agreement in a way which could readily be implemented in the external world. To this end a series of letters were drawn up, and duly signed by both brothers. These included

> 1) Joint letters from Ashraf and Afzal to the bank, respectively instructing the bank to remove Ashraf's name from the Khan and Co bank account held by it and to remove Afzal's name from the Chic Boutique bank account held by it.
>
> 2) A letter from both of them addressed "To whom it may concern" recording that Ashraf had full interest in three retail properties and that Afzal had "full interest" in two other properties.
>
> 4) A letter from Ashraf to the bank disclaiming any interest in a further property, 86 Hainault Road, Leightonstone E11 1EH, which had been registered in their joint names, and in which he informed the bank he had only acted as trustee for Afzal (following some exchanges shortly after with Afzal through Aslam, he followed with a further letter to the bank to be read with it, stating that he had agreed to purchase a 50 percent share in that property at the market value less the amount of various charges on it).

Once these assertions of intent were in place Shakila and Sajila (two brothers' sisters) made witness statements in identical terms, which recorded that once the documents had been signed:

> "We were all satisfied that [Afzal and Ashraf] have settled their entire business affairs and Ashraf was to go his own way from then on"

A commentary

From an anthropological perspective the processes which led to this outcome are entirely familiar, and in that sense the outcome of a distinctive set of Punjabi (and indeed South Asian) traditions, practices and attitudes. In those terms what was being negotiated here was in my opinion the dissolution of a *de facto* coparcenary which had emerged as the a result of

Afzal's and Ashraf's mutual collaboration in business activities, facilitated within, and legitimated by a meeting of the entire sibling group, with the two sisters, Shakila and Sajila, acting as neutral co-chairpersons. Hence it was they who acted in Punjabi (and English) terms as witnesses to the agreement.

However given what subsequently transpired, the precise significance of this agreement also needs further exegesis. First of all it did *not* signify the breakdown of kinship reciprocities amongst the siblings. On the contrary I am of the opinion that it confirmed that the intrusion into that pattern of reciprocities which had been precipitated by Afzal's and Ashraf's squabbles over their business activities were at an end, since they had 'settled their entire business affairs'. And whilst the wording appears to indicate that it was Ashraf who was wanting a better deal prior to the settlement, as I read the agreement the phrase 'Ashraf was to go his own way from then on' in my opinion it should in no way be read as an indication that he was to pursue his way outside the family fold from thereon. Rather it is better understood with respect to the previous phrase, namely his business affairs.

Subsequent Litigation

However this settlement did not mark the end of the dispute. Nearly three years later Ashraf issued these proceedings for declarations as to the existence of the partnership business between him and Afzal in the name of Khan and Co, for its dissolution and for accounts and enquiries to establish the partnership property and their respective entitlements in it on dissolution. In due course it was established that one of the key issues at stake was

> "Whether … Ashraf's claim to a share of the assets of the partnership Khan and Co arising on the dissolution of the partnership had been compromised by the agreement … [of 3 August 2002]."

When the case came to trial there was a great deal of debate about what had been said at the family meeting. In the course his oral, though not his written, evidence Ashraf insisted that he had made it clear at the meeting that he had further claims his brother, to which he said Afzal's response was that, if he persisted with them, he would have to take him to court. The judge observed that Ashraf had not made such an assertion in any of his witness statements; Afzal's evidence was he had said no such thing during the course of the meeting; if he had said anything like it must have been it before the meeting not at it.

So far as I can see neither Shakila nor Sajila gave evidence at the trial, although the contents of their witness statements noted above were placed before the court. However a third

brother, Aslam, did appear to give evidence in person, during the course of which he indicated that

> the only matters "brought to the table" were the six properties in the joint names referred to in the agreement. His account in his witness statement was, on this critical issue, in somewhat neutral terms, namely that once the various documents had been signed at the meeting: "We were all satisfied that they had settled their differences at that time."

However even though Aslam once again reiterated the view that all differences had been settled during the course of the meeting, his reference to the fact that issues had been 'brought to the table' led to the opening of a whole new can of worms as far as the Judge was concerned. Having noted that

> Aslam also said that the real issue at the meeting had been whether Afzal would cede to Ashraf the three properties that he did and that that and the other matters dealt with in the written documents were "the only issues brought to the table". He also expressed the perception that Afzal would never have entered into these agreements if there had been any question of Ashraf reserving further claims against him.

the trial Judge indicated that

> In my judgment Aslam was giving me an honest and accurate account of what transpired between the two brothers at the meeting. Accordingly I do not accept Ashraf's assertion that it was expressly made clear at the meeting that there were issues potentially unresolved by the agreements then reached and which might be the subject of litigation in the future. I also think that Aslam's perception that Afzal would never have conceded the 'three shops' had he believed that Ashraf might in the future pursue other claims, as an accurate one."

Yet despite his view of Aslam's and Ashraf's evidence, the Judge concluded that it did not necessarily follow that there was consensus at the meeting that Ashraf had undertaken not to pursue other claims. As he put it in his judgement

> It does not however … follow that either Ashraf or Afzal believe that Ashraf had bound himself not to make such claims.
>
> If the background against which the meeting took place was one where Afzal was asserting that the only issues on which out of court agreement was possible was the partition of the jointly owned property, I think it more likely that Ashraf attended the meeting hoping to reach agreement on those issues but without intending to abandon claims he might have in relation to other properties the purchase of which had been financed wholly or in part by the partnership and/or where the names in which the property was registered did not reflect the beneficial ownership.

In view of all this the trial judge took the view that the agreement was not one of compromise on all issues, but covered only the jointly-held properties identified in the document generated and signed at the meeting:

> It seems to me that both brothers would have come to the meeting with the knowledge that there were potentially other issues between them than simply the partition of the jointly held properties and that the omission of Afzal to include in the paperwork produced at the meeting any formula purporting to make the agreement one in full and final settlement was not accidental. At any rate, nothing having been expressly said about the agreement being in full and final settlement I do not think that the circumstances made it necessary or obvious that such a term should be implied.

On these grounds the trial Judge reached the conclusion that Ashraf's claim to a share of the assets of the partnership Khan and Co arising on the dissolution of the partnership had *not* been compromised by the agreement … [of 3 August 2002].

Afzal disagreed with this outcome, and pursued the matter to the Court of Appeal, where – despite the dictum referred to above – Auld, May and Arden LJJ all gave judgements supporting the trial Judge's arguments, and hence dismissed the appeal.

A commentary on these findings

Although an anthropologist must necessarily be exceedingly hesitant before challenging the adequacy and accuracy of a conclusion which has generated such comprehensive judicial unanimity, I nevertheless take the view that a closer examination of the facts of this case in the light of Lady Arden's dictum, as well as a more culturally informed appreciation of what went on at the family meeting on 3rd August 2002, should generate precisely the opposite conclusion from that which was reached by the trial Judge and confirmed by their Lordships.

With such considerations in mind, there can in my view be no doubt whatsoever that from a Punjabi perspective – and hence from the perspective of the participants themselves – the central objective of the 'family meeting' held on 3rd August 2002 was to resolve the dispute between Ashraf and Afsal. More specifically In other words it was a culturally grounded exercise in mediation, called and co-chaired by Shakila and Sajila, with the objective of resolving the dispute between Ashraf and Ashraf. Hence from a South Asian perspective it can best be regarded as an exercise in *vyavahara* – a process of dispute resolution aimed at remedying a disruption to the orderly operation a self-regulating collectivity on an equitable and mutually acceptable basis, in which members of – or at least representatives of – the entire collectivity, actively participate.

From personal experience I can readily testify that negotiations conducted in such contexts are invariably extremely robust. Moreover they are not just restricted to the antagonists themselves. Other members of the collectivity also participate, with the aim of driving the antagonists towards making concessions such that they eventually reach some kind of common ground which both parties are able to accept. So far as I can see the series of documents which Ashraf and Afzal signed, and which Shakila and Sajila witnessed as indicating that "We [i.e. the sibling group] were all satisfied that they have settled their entire business affairs and Ashraf was to go his own way from then on" was prepared as public record that the details of just such a compromise. Moreover the fact that the whole exercise was concluded by everyone shaking hands all round suggests that all the participants regarded what they had achieved was a comprehensive settlement of a serious dispute between family members, such that equanimity between them with respect to their 'entire business affairs' had indeed been achieved.

By contrast trial judge managed to persuade himself (and the Court of Appeal agreed) that what had been achieved as a result of this process was not so much a quasi-judicial *settlement* of their differences, but a much more limited *contractual agreement* which applied solely to properties in which the two brothers held joint ownership. He did so on two grounds:

i. There was evidence that the brothers came to the meeting with the knowledge that there were potentially other issues between them than simply the partition of the jointly held properties

ii. The omission of any formula purporting to make the agreement one in full and final settlement was not accidental, but served to reinforced his view that other issues which had not been explicitly placed 'on the table' during the course of the meeting were consequently not included in the agreement.

The basis on which the trial judge reached this conclusion was on the basis of his interpretation of the significance of Aslam's evidence, in the course of which Aslam had indicated that

a. the real issue at the meeting had been whether Afzal would cede to Ashraf the three properties that he did,
b. the other matters dealt with in the written documents were "the only issues brought to the table".
c. It was his perception that Afzal would never have entered into these agreements if there had been any question of Ashraf reserving further claims against him.

Given all this he went on to say that

> In my judgment Aslam was giving me an honest and accurate account of what transpired between the two brothers at the meeting.
>
> Accordingly I do not accept Ashraf's assertion that it was expressly made clear at the meeting that there were issues potentially unresolved by the agreements then reached and which might be the subject of litigation in the future.
>
> I also think that Aslam's perception that Afzal would never have conceded the 'three shops' had he believed that Ashraf might in the future pursue other claims, as an accurate one."
>
> [but] It does not however … follow that either Ashraf or Afzal believe that Ashraf had bound himself not to make such claims If the background against which the meeting took place was one where Afzal was asserting that the only issues on which out of court agreement was possible was the partition of the jointly owned property.
>
> I think it more likely that Ashraf attended the meeting hoping to reach agreement on those issues but without intending to abandon claims he might have in relation to other properties the purchase of which had been financed wholly or in part by the partnership and/or where the names in which the property was registered did not reflect the beneficial ownership.

In my view the trial judge seriously over-reached himself in rejecting point c. in Aslam's evidence, and substituting his own (Anglo-centric) conclusion that

i. because Afzal had been prepared to bargain away three jointly-owned properties in the course of reaching a compromise in the family meeting,

ii. and because there was no explicit reference to a 'full and final agreement the agreement' in any of the documentation

iii. and because Afzal had at some point asserted that the only issues on which out of court agreement was possible was the partition of the jointly owned property (which was not in my opinion an accurate representation of Ashraf's position, and one which he in any event denied taking in the course of the family meeting

iv. it was *ipso facto* safe to conclude that that Ashraf had no intention of abandoning claims he might have in relation to other properties the purchase of which had been financed wholly or in part by the partnership and/or where the names in which the property was registered did not reflect the beneficial ownership.

Despite the fact that

v. the sisters had carefully witnessed that the agreement they had been brokered under their *aegis* was one in which "We were all satisfied that [Afzal and Ashraf] have settled their *entire* business affairs and Ashraf was to go his own way from then on".

vi. Ashraf explicitly acknowledged that he had no claim on another property that he had *mistakenly believed* was then registered in their joint names.

In my opinion his interpretation of the evidence on this basis had had very serious consequences: far from taking active cognisance the distinctive traditions, practices and attitudes which underpinned the operation of what was in my opinion a routine Punjabi family meeting implementing a process of *vyavahara*, which in this case aimed to (and at the end of the day succeeded in) brokering an equitable division of the assets of coparcenary which Afzal and Ashraf had created between themselves, was rendered invisible.

Moreover the judgement did so by (mis)interpreting the means by which the family sought to represent the outcome of their deliberations in English terms – not least to provide a backstop should either of the parties turn to the English courts in search of a better deal, thereby reneging on the terms of the settlement which had been collectively agreed upon.

This was achieved as a result of the trial judge's decision (which was not challenged by the Court of Appeal) to read the documents which had been prepared for use in just the kind of situation which subsequently transpired not as a record of the agreement to dissolve a coparcenership, but rather as a narrowly constituted contractual agreement between Afzal and Ashraf with respect to 'jointly owned' (in the English sense) properties, and that the absence of the words 'full and final settlement' could consequently be read as an indication that there could well be, and indeed were, some remaining issues between the parties which had not been addressed in the settlement.

So it was that Ashraf succeeded in obtaining a ruling that Ashraf *was* entitled to claim a share in the assets arising from the dissolution of the partnership Khan and Co, and that this had not been compromised by the previous agreement. By doing so the trial judge (subsequently supported by the Court of Appeal) both ignored and over-ruled the key objective of the whole event: the equitable and consensually agreed upon dissolution of a specifically South Asian corporate structure: a coparcenership.

10th October 2009